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DECISION



**THE COMPTROLLER GENERAL
OF THE UNITED STATES**
WASHINGTON, D.C. 20548

FILE: B-195773

DATE: August 11, 1980

MATTER OF: Interscience Systems, Inc.; Cencom
Systems, Inc. - Reconsideration

DIGEST:

1. Where interested party and procuring agency, in request for reconsideration, come forward with facts which they contend require overturning prior decision, and such facts were in their possession during development of protest, evidence of interested party will not be considered. In future, procuring agency's late submission will be treated similarly but will be considered in instant matter.
2. While agency contends other firms could have offered computer system, independent investigation reveals firms only could furnish hardware, not required software. Therefore, prior decision concerning sole-source nature of item is affirmed.
3. Recommendation in prior decision that contract be terminated and requirement resolicited is modified in view of agency contention that such action would disrupt critical computer services and current contract may continue during resolicitation effort and then be terminated if incumbent is not successful offeror under new solicitation.

The Environmental Protection Agency (EPA) has requested reconsideration of our decision in the matter of Interscience Systems, Inc.; Cencom Systems, Inc., 59 Comp. Gen. (B-195773, B-195773.2, May 8, 1980), 80-1 CPD 332, which involved a contract awarded to Sperry Univac (Univac) under request for proposals (RFP) No. WA79-D169.

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The RFP was for various items of automatic data processing equipment to expand EPA's National Computer Center. The prior decision held that EPA had improperly included two items (central processing systems expansion and maintenance of Government-owned Sperry Univac equipment, subsections 2.1 and 2.5, respectively) in the RFP, for which there was no reasonable expectation of competition. We recommended that Univac's contract be terminated under Article XXV of the contract which permitted the Government to discontinue rental payments on 30 days' notice. We recommended that sole-source negotiations be commenced with Univac for subsections 2.1 and 2.5 and that subsections 2.2 and 2.3 be recompeted in a separate procurement.

EPA states that it had a reasonable expectation of obtaining competition for subsections 2.1 and 2.5 and that our decision, which concluded the opposite, was based on circumstantial evidence because EPA only made a general statement as to that expectation during the protest proceedings. EPA now submits evidence which, it argues, shows the existence of potential competition. According to EPA, this evidence was not submitted previously because GAO had never required an agency to justify why it was not making a sole-source award, and at no time during the course of the protest did GAO request supporting findings or evidence from EPA regarding the expectation of competition.

We think EPA has misinterpreted our prior decision. What we held in the May 8 decision was that by commingling sole-source items with competitive items and permitting multiple-award discounts, EPA had precluded competition on items 2.2 and 2.3 and, in effect, awarded sole-source contracts for 2.1 and 2.5 under the guise of competition. In other words, Univac could have lowered its prices on items 2.2 and 2.3 to meet the competition and "get well" on items 2.1 and 2.5 without concern as to the competition or the need to justify its prices to the agency. This award was made without the normal protection available in such an award of securing cost and pricing data. Our recommendation for corrective action was aimed at EPA curing the defect in the procurement, i.e., a sole-source award without any assurance that it had obtained a reasonable price.

The issue of EPA's basis for expecting competition for subsections 2.1 and 2.5 was clearly raised by the protesters and at the bid protest conference held on the protest attended by all the parties. EPA came forward with no evidence to support its general statement that it expected competition. This applies to Univac's submission on EPA's request for reconsideration citing past instances of procurements which, it contends, shows it competed under fear of competition. Univac contends it has "long been aware of this evidence." Univac, as the awardee and an interested party to the protest, received copies of all submissions and attended the conference. No substantive submissions or comments were made by Univac during the protest.

Parties or agencies which withhold or fail to submit all relevant evidence to our Office in the expectation that our Office will draw conclusions beneficial to them do so at their own peril since it is not the function or province of our Office to prepare for parties involved in a protest defenses to allegations clearly raised. Accordingly, we will not consider the Univac evidence since, previously, it had knowledge of and was presented ample opportunity to submit that evidence. See Decision Sciences Corporation--Request for Reconsideration, B-188454, December 21, 1977, 77-2 CPD 485. As we have not previously so ruled concerning a procuring agency, we will consider the matters raised by EPA. But, in the future, submissions containing such evidence available to an agency will be treated in the same manner as that submitted by a protester or interested party.

As concerns the expectation of competition for subsection 2.1, EPA states that Southwestern Bell Telephone was soliciting a buyer for the Univac Series 1100 System required by subsection 2.1 at the time the RFP was issued and has forwarded a classified advertisement from a trade paper announcing the sale of the unit. EPA further states that such units were also available from third party brokers.

We have ascertained through independent investigation, which EPA could have but did not, that none of the items for sale included software which was required by subsection 2.1 and much of the software, such as

Level 36 of Univac 1100 Operating System software, is proprietary to Univac. Therefore, the "new" evidence submitted by EPA does not present a basis to alter our prior conclusion that no reasonable expectation of competition existed for subsection 2.1.

Regarding subsection 2.5, EPA has listed six computer installation sites where firms other than Univac are maintaining Univac 1100 systems, which EPA argues shows there are firms capable of maintaining Univac equipment; therefore, competition was expected on subsection 2.5. Interscience has responded that it has critically examined these sites and that none of the maintenance contracts were operating at the levels of staffing or experience required under this RFP.

We find it unnecessary to resolve this dispute. Even if EPA is correct about subsection 2.5, the fact that subsection 2.1, the most costly of all subsection items, was a sole-source item, was enough to taint the procurement in view of the allowability of multiple-award discounts in the RFP which commingled sole source and competitive items.

Because of the above, we see no need to discuss EPA's objections to our observations concerning post-proposal receipt matters which, in our view, confirmed that no reasonable expectation of competition existed prior to the solicitation.

EPA takes issue with our conclusion that Univac's awareness of its sole-source position without competition or cost or pricing data did not assure reasonable prices. EPA contends that (1) competition existed (which we have concluded was not the case); (2) the discounts offered by Univac were substantial and reflect the fact that Univac was offering prices under the threat of competition because the discounts offered on the uncontestedly competitive subsections were comparable to those offered on those subsections found to be noncompetitive by our Office; and (3) Univac's prices were reasonable based on a price analysis and comparison of the prices with established Univac commercial prices.

Univac offered two separate discounts for each subsection. One discount figure applied if Univac were awarded one, two or three subsections and the other applied if Univac was awarded all four subsections. These discounts more than tripled on the noncompetitive subsections if Univac was awarded all four subsections. However, for the competitive subsections the discount declined. Accordingly, the pricing pattern employed lends no support to EPA's position and despite EPA's assurances that reasonable prices were obtained because of its price analysis, the lack of competition and the commingling of competitive and noncompetitive items did not assure the most favorable discounts from Univac.

EPA has questioned the remedy we recommended-- termination of the Univac contract, recompetition of subsection 2.2 and 2.3, and sole-source negotiations with Univac for subsections 2.1 and 2.5. According to EPA, the termination without a replacement contractor ready to perform, will adversely impact on the National Computer Center. Therefore, to assure continuity of service, the recommendation is modified so that the Univac contract may continue during the recompetition and sole-source negotiations. Then if the successful offeror is other than Univac, the Univac contract should be terminated when performance is imminent. We expect that EPA will reprocur in a timely fashion.

EPA contends that there is no need to disturb the award of subsections 2.1 and 2.5 since these were not protested. As we recognized in our prior decision and our above discussion, without adequate competition there is no assurance of the reasonableness of the price. Therefore, cost and pricing data should be obtained for 2.1 and if this data does not support the price offered then negotiations should be commenced with Univac on 2.1.

Finally, EPA should investigate thoroughly whether competition exists for subsection 2.5, considering Interscience's position. If competition exists, then our Office would have no objection to that subsection's inclusion in the solicitation being issued for subsections 2.2 and 2.3. (Our comments in the May 8 decision regarding the experience requirements in drafting such

a solicitation are still applicable.) If no competition is expected, the same procedures outlined for 2.1 should be followed.

Accordingly, our prior decision is affirmed and the recommendation is modified in part.


Comptroller General
of the United States